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Attorneys for Plaintiffs

8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

Case No.: 2:10-CV-187-LRH-
(RJJ)

11 HAFEN RANCH ESTATES, a Nevada Corporation;
12 NYE COUNTY CONSTRUCTION, LLC, a Nevada
Limited-Liability Company; and PAHRUMP
UTILITY COMPANY, INC., a Nevada Corporation,

13 Plaintiffs,

14 v.

15 KEVIN MCGINNIS, a Nevada Resident; THE
16 FORD METER BOX COMPANY INC., an Indiana
Corporation; A.Y. MCDONALD MFG. CO., an
17 Iowa Corporation; FERGUSON ENTERPRISES,
INC., a Virginia Corporation; HD SUPPLY
18 WATERWORKS, LP, a Florida Limited Partnership;
U.S. FILTER DISTRIBUTION GROUP, INC., a
19 Georgia Corporation; NATIONAL
WATERWORKS, INC., a Texas Corporation; WFX,
20 LLC d/b/a WESFLEX PIPE MANUFACTURING, a
California Limited-Liability Company; CHEVRON
21 PHILLIPS CHEMICAL COMPANY LP, a Texas
Limited Partnership; DOES I-X; and ROE
22 CORPORATIONS XI-XX,

23 Defendants.

**PLAINTIFFS' MOTION TO
STRIKE DEFENDANT
NATIONAL WATERWORKS,
INC.'S UNTIMELY CONSENT TO
REMOVAL**


25 COME NOW Plaintiffs Hafen Ranch Estates, Nye County Construction, LLC, and
26 Pahrump Utility Company, Inc., by and through their counsel of record, Kemp, Jones &
27 Coulthard, LLP, and hereby file this Motion to Strike National Waterworks, Inc.'s Untimely
28 Consent to Removal. This Motion is made and based upon the pleadings and papers on file

1 herein, the following Memorandum of Points and Authorities, and any such evidence as may be
2 adduced at a hearing on this Motion.

3 DATED this 10th day of May, 2010.

4 Respectfully submitted by:

5 KEMP, JONES & COULTHARD, LLP

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7 
8 J. Randall Jones, Esq. (Nev. Bar No. 01927)
9 Michael J. Gayan, Esq. (Nev. Bar No. 011135)
10 3800 Howard Hughes Parkway, 17th Floor
11 Las Vegas, Nevada 89169
12 Attorneys for Plaintiffs

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I.**

13 **INTRODUCTION**

14 Defendant National Waterworks, Inc. ("National") failed to consent to removal within
15 thirty (30) days after service of the complaint and summons as required by 28 U.S.C. § 1446(b).
16 In Plaintiffs' Reply in Support of the Motion to Remand (Doc. #44), Plaintiffs pointed to the
17 lack of consent by A.Y. McDonald Mfg. Co. as a fatal flaw to the notice of removal preventing
18 this Court from retaining jurisdiction of this case. National attempted to avoid any further
19 defects in the removal procedure by filing a Consent to Removal on April 22, 2010, over 80 days
20 after the maximum time allowed under 28 U.S.C. § 1446(b) (Doc. #53). Nothing in the
21 unambiguous statute, Ninth Circuit case law, or the facts of this case provide for an exception to
22 the thirty-day time limit under these circumstances. As such, Plaintiffs ask this Court to strike
23 and disregard National's Consent to Removal (Doc. #53).

24 **II.**

25 **MATERIAL FACTS**

26 On December 15, 2009, Plaintiffs filed a complaint in state court against Defendants for
27 damages sustained to Plaintiffs' residential water service lines in the Artesia at Hafen Ranch
28 Estates development located in Pahrump, Nevada. National was properly joined and served on

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January 26, 2010. This information was made available to all parties on January 27, 2010, when the summons and affidavit of service were electronically filed with the state court.¹ On February 11, 2010, Defendant Ferguson Enterprises, Inc. ("Ferguson") filed a Notice of Removal (Doc. #1). Ferguson's Notice of Removal contained a statement that counsel for HD Supply Waterworks, LP ("HD Supply") had no objection to removal of this action (Doc. #1, 5:4-5). Within two weeks of Ferguson filing its Notice of Removal, Defendants Chevron Phillips Chemical Company LP ("CPChem"); HD Supply; McGinnis; and WFX, LLC dba Wesflex Pipe Manufacturing ("WFX") filed papers indicating their consent to removal (Doc. # 5, 7 and 13).² However, National failed to consent to removal until April 22, 2010 (Doc. #53).

III.

ARGUMENT

A. National's Untimely Consent to Removal Must Be Stricken and Disregarded by this Court.

The federal statute governing removal procedures provides that:

The notice of removal of a civil action or proceeding *shall be filed within thirty days* after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. §1446(b) (emphasis added). The statute's language of "whichever period is shorter" indicates legislative intent to ensure the notice of removal deadline does not extend beyond the earliest calculable thirty-day period. In cases involving multiple defendants, all defendants must "either consent to or join the removal proceedings." *Knutson v. Allis-Chalmers Corp.*, 358 F.Supp.2d 983, 990 (D.Nev. 2005). The Ninth Circuit recently explained that the unanimity of defendants rule may be satisfied either by each defendant filing a consent document or by "one

¹ See file-stamped copy of Summons and Affidavit of Service for National Waterworks, Inc., attached hereto as Exhibit 1.

² At the time of Ferguson's Notice of Removal, potential issues existed regarding service for Defendants The Ford Meter Box Company Inc. ("Ford") and U.S. Filter Distribution Group, Inc. ("U.S. Filter"). As such, Plaintiffs do not raise these Defendants' failure to join in the Notice of Removal at this time.

1 defendant's timely removal notice containing an averment of the other defendants' consent and
2 signed by an attorney of record." *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1225
3 (9th Cir. 2009).

4 On January 26, 2010, Plaintiffs served National with the Summons and Complaint. *See*
5 Exhibit 1. Under 28 U.S.C. §1446(b), National was required to file a notice of removal within
6 thirty days (on or before February 25, 2010). National did not file a document showing its
7 consent to removal until April 22, 2010, which is 86 days after the date on which it was served
8 with the initial pleading and summons. Ferguson's Notice of Removal did not contain an
9 averment that National consented to removal. The other Defendants' timely consent to removal
10 documents do not contain an averment that National consented to removal. Under *Proctor*,
11 National failed to timely consent to removal because it did not file a separate consent document
12 within thirty days and it did not make sure that another Defendant in this action included a
13 statement indicating National's consent to removal. Therefore, this Court should strike
14 National's untimely Consent to Removal (Doc. #53) and disregard it when considering
15 Plaintiffs' Motion to Remand (Doc. #44).

16 IV.

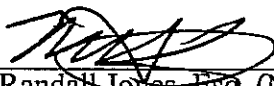
17 CONCLUSION

18 Plaintiffs ask this Court to strike National's untimely Consent to Removal (Doc. #53)
19 because it was filed more than 50 days *after* the maximum time period allowed under 28 U.S.C.
20 §1446(b).

21 DATED this 10th day of May, 2010.

22 Respectfully submitted by:

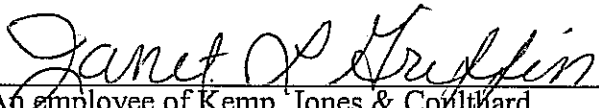
23 KEMP, JONES & COULTHARD, LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing **PLAINTIFFS' MOTION TO STRIKE NATIONAL WATERWORKS, INC.'S UNTIMELY CONSENT TO REMOVAL** was made on the 10th day of May, 2010, via the United States District Court's CM/ECF electronic filing system addressed to all parties on the e-service list.

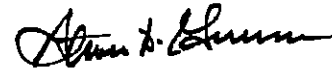

An employee of Kemp, Jones & Coulthard

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EXHIBIT

1

Electronically Filed
01/27/2010 01:15:24 PM



CLERK OF THE COURT

SUMM

J. RANDALL JONES, ESQ. (#1927)
MICHAEL J. GAYAN, ESQ. (#11135)
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

Case No.: A-09-605966-D
Dept. No.: XXII

SUMMONS - CIVIL

HAFEN RANCH ESTATES, a Nevada
Corporation; NYE COUNTY
CONSTRUCTION, LLC, a Nevada Limited-
Liability Company; and PAHRUMP
UTILITY COMPANY, INC., a Nevada
Corporation,

Plaintiffs,

v.

KEVIN MCGINNIS, a Nevada Resident;
THE FORD METER BOX COMPANY
INC., an Indiana Corporation; A.Y.
MCDONALD MFG. CO., an Iowa
Corporation; FERGUSON ENTERPRISES,
INC., a Virginia Corporation; HD SUPPLY
WATERWORKS, LP, a Florida Limited
Partnership; U.S. FILTER DISTRIBUTION
GROUP, INC., a Georgia Corporation;
NATIONAL WATERWORKS, INC., a
Texas Corporation; WFX, LLC d/b/a
WESFLEX PIPE MANUFACTURING, a
California Limited-Liability Company;
CHEVRON PHILLIPS CHEMICAL
COMPANY LP, a Texas Limited
Partnership; DOES I-X; and ROE
CORPORATIONS XI-XX,

Defendants.

SUMMONS - CIVIL

**NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU
WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS.
READ THE INFORMATION BELOW.**

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1 **TO THE DEFENDANT NATIONAL WATERWORKS, INC.:** A civil Complaint has been
 2 filed by the Plaintiffs against you for the relief set forth in the Complaint.

3 1. If you intend to defend this lawsuit, within 20 days after this Summons is served
 4 on you, exclusive of the day of service, you must do the following:

- 5 a. File with the Clerk of this Court, whose address is shown below, a formal
 6 written response to the Complaint in accordance with the rules of the
 7 Court, with the appropriate filing fee.
 8 b. Serve a copy of your response upon the attorney whose name and address
 9 is shown below.

10 2. Unless you respond, your default will be entered upon application of the Plaintiffs
 11 and failure to so respond will result in a judgment of default against you for the relief demanded
 12 in the Complaint, which could result in the taking of money or property or other relief requested
 13 in the Complaint.

14 3. If you intend to seek the advice of an attorney in this matter, you should do so
 15 promptly so that your response may be filed on time.

16 4. The State of Nevada, its political subdivisions, agencies, officers, employees,
 17 board members, commission members and legislators each have 45 days after service of this
 18 Summons within which to file an Answer or other responsive pleading to the Complaint.

19 Submitted by:

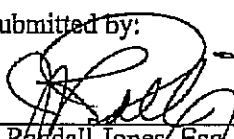
CLERK OF COURT

By:

DeEVRA KNIGHT



JAN 14 2010

20 
 21 J. Randall Jones, Esq. (001927)
 22 Michael J. Gayan, Esq. (011135)
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 28

Deputy Clerk Date
 Regional Justice Center
 200 Lewis Avenue
 Las Vegas, Nevada 89155

NOTE: When service is by publication, add a brief statement of the object of the action.
 See Nevada Rules of Civil Procedure 4(b).

AFFIDAVIT OF SERVICE

STATE OF _____ }
COUNTY OF _____ } ss:

_____, being duly sworn, says: That at all times herein affiant was and is over 18 years of age, not a party to nor interested in the proceeding in which this affidavit is made. That affiant received ___ copy(ies) of the Summons and Complaint, and Initial Appearance Fee Disclosure on the 26 day of JANUARY, 2010, and served the same on the 26 day of JANUARY, 2010, by:

(Affiant must complete the appropriate paragraph)

1. Delivering and leaving a copy with the Defendant _____
at SEE ATTACHED AFFIDAVIT;

2. Serving the Defendant _____ by personally
delivering and leaving a copy with _____, a person of suitable age and
discretion residing at Defendant's usual place of abode located at _____

[User paragraph 3 for service upon agent, completing (a) or (b)]

3. Serving the Defendant _____ by personally
delivering and leaving a copy at _____

(a) With _____ as _____, an agent
lawfully designated by statute to accept service of process;

(b) With _____, pursuant to NRS 14.020 as a person of
suitable age and discretion at the above address, which address is the address of the resident
agent as shown on the current certificate of designation filed with the Secretary of State.

4. Personally depositing a copy in a mail box of the United States Post Office, enclosed in a
sealed envelope, postage prepaid (check appropriate method):

- ☐ Ordinary mail
- ☐ Certified mail, return receipt requested
- ☐ Registered mail, return receipt requested

addressed to the Defendant _____, at Defendant's last known

KEMP, JONES & COULTHARD, LLP
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1 address which is _____
2 I declare under penalty of perjury under the laws of the State of Nevada, that the
3 foregoing is true and correct.
4 EXECUTED on this _____ day of _____, 2010.
5
6
7 Signature of person making service
8 Subscribed and sworn before me
9 this _____ day of _____, 2010.
10
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12 Notary Public
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CAUSE NO. A-09-605966-D

**HAFEN RANCH ESTATES, a Nevada
Corporation; NYE COUNTY CONSTRUCTION,
LLC, a Nevada Limited-Liability Company; and
PAHRUMP UTILITY COMPANY, INC., a
Nevada Corporation**

In the Court of The

Plaintiff(s)

DISTRICT COURT

VS.

**KEVIN MCGINNIS, a Nevada Resident; THE
FORD METER BOX COMPANY INC., an
Indiana Corporation; A.Y. MCDONALD MFG
CO. an Iowa Corporation; FERGUSON
ENTERPRISES INC., a Virginia Corporation;
HD SUPPLY WATERWORKS, LP, a Florida
Limited Partnership; U.S. FILTER
DISTRIBUTION GROUP, INC., a Georgia
Corporation; NATIONAL WATERWORKS,
INC., a Texas Corporation; WFX, LLC d/b/a
WESTFLEX PIPE MANUFACTURING, a
California Limited-Liability Company;
CHEVRON PHILLIPS CHEMICAL
COMPANY LP, a Texas Limited Partnership;
DOES I-X; and ROE CORPORATIONS XI-XX**

CLARK COUNTY, NEVADA

Defendant(s)

AFFIDAVIT OF SERVICE

Came to hand on Tuesday, January 26, 2010, at 11:55 AM
Delivered at: 4265 SAN FELIPE #1100, HOUSTON, TEXAS 77027
Within the county of Harris at 12:15 PM on January 26, 2010,
By delivering to the within named: HD Supply Waterworks Group, Inc., through its registered
agent Corporate Creations Network, Inc.. Kim Harpman
In person a true copy of this Summons, Complaint for Damages, Demand for Jury Trial and an
Initial Fee Disclosure

BEFORE ME, the undersigned authority, on this day personally appeared Daniel Kennedy, who after being duly sworn on oath states: "My name is Daniel Kennedy, of 2530 Briar Ridge #66, Houston, Texas 77057, my telephone number is 713-865-2861, my SCH # is 003043, I am a person over eighteen (18) years of age and I am competent to make this affidavit. I am a resident of the State of Texas. I am not a party to this suit nor related or affiliated with any herein, and have no interest in the outcome of this suit. I am familiar with the Texas Rules of Civil Procedure, and the Texas Practice and Remedies Codes as they apply to service of process. I have never been convicted of a felony or of a misdemeanor involving moral turpitude."

Daniel Kennedy

Of: Harris County

By: D. Kennedy

Private Process Server

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned Notary Public

on this 27 TH day of January, 2010.

Amanda Espinosa
Notary Public State of Texas

